

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1458

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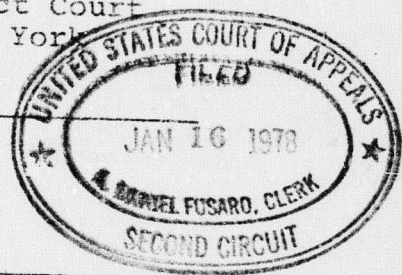
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
MICHAEL PAPPADIO,
Defendant-Appellant.

On Appeal From The United States District Court
For the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLANT



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TABLE OF CONTENTS

Preliminary Statement	<u>Page</u> 1
Statement of the Facts	3
Issues Presented	8
POINT I: THE REMARKS OF THE PROSECUTOR IN SUMMATION ENTITLE APPELLANT TO A NEW TRIAL	9
POINT II: THE APPELLANT DID MAKE A MATERIAL MISREPRESENTATION ON THE 941 FORM	15
POINT III: THE TRIAL COURT ERRED BY NOT SEVERING THE TWO SEPARATE CONSPIRACIES	19
POINT IV: AS TO COUNTS 3 and 4, THE GOVERNMENT FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE CASE	27
POINT V: INSUFFICIENT EVIDENCE WAS PRESENTED DURING THE TRIAL TO SUSTAIN A GUILTY VERDICT	29
Conclusion	34

TABLE OF CASES

	<u>Page</u>
<u>Anderson v. United States</u> 318 U.S. 350 (1943)	24
<u>Berger v. United States</u> 295 U.S. 78 (1935)	14
<u>Bryant v. Caldwell</u> 484 F.2d 65 (5th Cir., 1973)	14
<u>Burgos v. United States</u> 304 F.2d 177 (2nd Cir., 1962)	12
<u>Cross v. United States</u> 335 F.2d 987 (D.C., 1964)	24
<u>Hemphill v. United States</u> 402 F.2d 187 (D.C., 1968)	29
<u>King v. United States</u> 355 F.2d 700 (1st Cir., 1966)	19
<u>Kotteakos v. United States</u> 328 U.S. 750 (1946)	20
<u>McElroy v. United States</u> 164 U.S. 76 (1896)	21
<u>McTheany v. United States</u> 365 F.2d 90 (9th Cir., 1966)	21
<u>United States v. Bohle</u> 445 F.2d 54 (7th Cir., 1971)	27, 28
<u>United States v. Bora</u> 493 F.2d 33 (5th Cir., 1974)	21
<u>United States v. Bozza</u> 365 F.2d 206 (2nd Cir., 1966)	24
<u>United States v. Granello</u> 265 F.2d 990 (2nd Cir., 1966)	21
<u>United States v. Holt</u> 108 F.2d 265 (7th Cir., 1939)	12
<u>United States v. Leach</u> 429 F.2d 956 (8th Cir., 1970)	20

Table of Cases (cont.)	<u>Page</u>
<u>United States v. Marionneaux</u> 514 F.2d 1244 (5th Cir., 1975)	21
<u>United States v. Miley</u> 513 F.2d 1191 (2nd Cir., 1975)	21
<u>United States v. Newman</u> 490 F.2d 139 (3rd Cir., 1974)	11
<u>United States v. Romanow</u> 509 F.2d 26 (1st Cir., 1975)	17
<u>United States v. Roselli</u> 432 F.2d 879 (8th Cir., 1970)	20
<u>United States v. Sober</u> 281 F.2d 244 (3rd Cir., 1960)	12
<u>United States v. Spanglet</u> 258 F.2d 338 (2nd Cir., 1958)	12
<u>United States v. Tamaiolo</u> 249 F.2d 683 (2nd Cir. 1957)	24
<u>United States v. Vuitch</u> 402 U.S. 62 (1971)	33

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT COURT

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UNITED STATES OF AMERICA,
:
Appellee,
:
-against-
:
MICHAEL PAPPIDIO,
:
Defendant-Appellant,
-----x

Docket NO. 77-1458

BRIEF ON BEHALF OF APPELLANT
PAPPIDIO

PRELIMINARY STATEMENT

This brief is submitted on behalf of the appellant, Michael Pappidio, on appeal from a judgment of conviction entered in the United States District Court for the Eastern District of New York. After a trial before the Honorable Edward Neaher and a jury, the appellant was convicted of an eleven-count indictment charging violations of:

- 1) 18 U.S.C. §371--Conspiracy-Count 1
- 2) 26 U.S.C. §7201--Evasion of Corporate Income Taxes-Counts 3 and 4
- 3) 26 U.S.C. §7206(1)--Filing a False Statement-Counts 5, 6, 7, 0, 12, 17, 18 and 19.

The appellant was sentenced to a two-year term of imprisonment on each count (subject to 3651 of Title 18) and fined a total of \$2,000 with respect to each of the counts on which he was

convicted and the cost of prosecution. The appellant is presently free on bail pending appeal. A timely notice of appeal was filed.

STATEMENT OF FACTS

The appellant along with Matteo De Lorenzo and Alphonse Esposito was charged in a multi-count criminal indictment with conspiracy and various violations of the Internal Revenue Code (Title 26, United States Code). According to the government, Pappidio, as chief officer and shareholder of M.B.H. Sales, Inc. (hereinafter referred to as "MBH") and of Bidio Management Corp. (hereinafter referred to as "Bidio"), permitted the names of De Lorenzo and Esposito to be placed on the employee records of either or both of these corporations. It was alleged that neither De Lorenzo nor Esposito were bona fide employees but that the reason for listing them as employees of MBH and/or Bidio was to permit the corporations to substantially reduce their federal tax liability.*

The two conspiracy counts charged that Pappidio, with De Lorenzo and Esposito respectively, conspired to "unlawfully, wilfully and knowingly attempt to evade [the corporations']...income taxes." The indictment went on to charge the actual evasion of taxes by the corporations. Furthermore, the defendants allegedly caused the submission of various false statements to the Internal Revenue Service so as to mislead that agency by filing inaccurate Employer's Quarterly Federal Tax Returns (Form 941). The final portion

*Later on, the government would argue that this also permitted Pappidio to retain these salaries without reporting them as income. However, the evidence on this theory was questionable at best.

of the indictment charged De Lorenzo and Esposito with tax evasion, with Pappidio named as an aider and abettor.

The Government case consisted primarily of an attempt to prove the charges in the negative. Helen Miller, bookkeeper for MBH and Bidio, testified that although she would prepare the payroll for the corporations, she did not know what either De Lorenzo or Esposito may have done for the corporation (Tr. 148-149)*. Furthermore, she asserted that in certain instances she would cash a De Lorenzo payroll check and give the proceeds to Pappidio. (Tr. 114). However, she was unable to identify any of the salesmen who worked for Bidio or MBH (Tr. 205). So too, Myron Raisman, the corporations' accountant, testified that while he did prepare the corporate tax returns, he did not know either of these "employees". (Tr. 267, 276). In fact, he admitted that since his yearly charge to MBH or Bidio was \$200 per year, his presence on the premises would have been negligible. (Tr. 354). This testimony merely set the stage for the central government argument that no one who dealt with these companies knew De Lorenzo or Esposito. The government attempted to prove this by calling various individuals who had contracted for the services of MBH or Bidio. (Tr. 449-480; 513-584; 637-686). These individuals testified that they had never heard of De Lorenzo or Esposito. However, there were serious flaws in this theory. For the most part, these witnesses

*Tr. denotes - Trial record
A denotes - Appendix

could never have known if De Lorenzo or Esposito were bona fide employees. They were corporate officers who, by their own admissions, would not have dealt with salesmen. In some cases, these witnesses could not even identify Pappidio.

In a further attempt to bolster its theory, the government called Irwin Bishins, Pappidio's partner in MBH and Bidio. However, his testimony was as probative as that of the officers and employees of the other corporations. (Tr. 355-444). Bishins testified that although he was an equal partner with Pappidio in MBH (1/3) and Bidio (1/2), the day-to-day operations, including setting salaries and hiring employees, was left to Pappidio's discretion which Bishins trusted implicitly. (Tr. 365-366, 381-383). In fact, Nat Sacco, foreman for MBH and Bidio, testified on the government's direct case that both De Lorenzo and Esposito had been introduced to him as salesmen sometime between 1968 and 1972 (Tr. 486-487).

The government also called Richard Daro, a 50% partner of Pappidio's in Daro Sales, who testified that Daro Sales did some work for Bidio (Tr. 587) but that he was unaware of whether or not Esposito worked for Bidio (Tr. 602). He further stated that Pappidio actually ran the business by himself. (Tr. 600-601). Daro had no knowledge concerning who Pappidio hired or fired. He also testified that Esposito visited him in April, 1974, requesting a job (Tr. 589).

Thereafter the government called Mario Suriano, Pappidio's nephew by marriage, to the stand. (Tr. 687-712a).

Suriano testified that at one point he sought out Pappidio for a loan of \$25,000 in order to build a house. (Tr. 689). Pappidio loaned him the \$25,000 in cash and checks, a small portion of which (\$900) consisted of De Lorenzo payroll checks (Tr. 704). From this the government sought to argue that De Lorenzo could not have been an employee because Pappidio treated his "payroll checks" as if they were his own. Obviously, the mere fact that Pappidio had \$900 in checks (when De Lorenzo was paid in excess of \$25,000 each year) was not dispositive of the issue.

The final government witness, Sidney Buchbinder, (Tr. 770-971) Revenue Agent and technical advisor to the Regional Counsel, attempted to establish a motive for Pappidio in "falsely" listing De Lorenzo and Pappidio as employees. According to Buchbinder, if Pappidio actually retained the checks, it would have allowed him the use of a substantial amount of untaxed income and would further have reduced the corporate tax liability. (Tr. 807-810).

At the close of the government's case, the charges against Esposito were dismissed, as were the counts against Pappidio relative to Esposito. (Tr. 1053-1057). As to De Lorenzo and Pappidio, the case went to the jury which returned guilty verdicts as to all counts

As is evident from this brief summary of the evidence, the government rested its entire case upon negative inferences and speculation. There was no direct proof--no witness who

could categorically state that De Lorenzo or Esposito did not work for MBH or Bidio. As will be demonstrated below, the weakness of the government case, coupled with the errors committed during the trial, mandate a reversal of Pappidio's conviction.

ISSUES PRESENTED

1. Were the prosecutor's closing statements so prejudicial to the appellant as to require a new trial?
2. Does the false listing of employees on a 941 Form constitute a material misrepresentation?
3. Did the Court invade the province of the jury by finding that listing of an alleged employee on a 941 Form constituted a material fact as a matter of law?
4. Did the Trial Court err in not granting severance of the defendants by virtue of failure to allege a common or inter-connected conspiracy?
5. Did the Government fail to prove that the appellant falsely prepared and signed the corporate income tax returns in New York thus not proving a necessary element of the crimes charged.
6. Was sufficient evidence presented during the trial to sustain a guilty verdict?

POINT I

THE REMARKS OF THE PROSECUTOR
IN SUMMATION ENTITLE APPELLANT
TO A NEW TRIAL.

Unquestionably a criminal defendant is entitled to a verdict, whether of guilt or innocence, based solely upon the evidence adduced at trial. A misstatement of fact by the prosecution in summation detracts from the jury's ability to accurately evaluate the evidence. In the instant case, the Assistant United States Attorney, despite prior warnings, persisted in misquoting the evidence. The prosecutor, in summation, stated:

"...evidence is shown that no one, no one, in the industry, in the garment industry who dealt with MBH or Bidio ever heard of Matteo De Lorenzo ..." (91A)
(Emphasis supplied.)

* * *

"Nobody that does business with that company ever heard of him." (133A).

This was precisely a crucial fact at issue in the instant case. If the government was able to demonstrate that, in fact, De Lorenzo was not an employee of MBH or Bidio, this would have gone a long way toward proving its case. However the evidence was woefully insufficient to permit the government to affirmatively argue that "no one" had ever heard of De Lorenzo.

The government attempted to prove the lack of De Lorenzo's employment through the testimony of various individuals employed within the garment industry. Although the

companies with whom these witnesses were associated did business with MBH and for Bidio, they testified that they would not have been in a position to deal with MBH or Bidio's salesmen (De Lorenzo's classification). These witnesses - company presidents, vice-presidents, and showroom men - would not have met De Lorenzo or Esposito who would have dealt with production men. Judge Neaher placed little credence in this testimony in proving the government's case (Tr. 1056).

Furthermore, the Court observed that:

"...some of them virtually disclaimed any real contact with either of these two corporations because they left it to their cutting people." (Tr. 1028)

At the close of the government's case counsel for Esposito moved for an order dismissing the case as to that defendant. In granting that application Judge Neaher repeatedly condemned the garment industry testimony:

"I would say that the testimony of the customers that I heard, for the most part, was ambivalent to say the least." (Tr. 1015)

* * *

"How do we know their cutting foremen were not approached? There is nothing that suggests that these people who disclaim contact with such detailed - that's really the impression they left on me ---" (Tr. 1029)

* * *

"In view of the limited and qualified nature of their contacts with the defendant, an inference that Esposito was not an employee would be left to conjecture and is wholly unwarranted." (Tr. 1056)

The testimony of these garment industry witnesses was no more convincing as to De Lorenzo than it was as to Esposito. Not only were these witnesses not in a position to know every employee of MBH or Bidio, but, to carry the government's theory to its logical conclusion, it would have been necessary to call each and every customer of MBH and Bidio, and perhaps, each employee of those customers.

The prejudice engendered by the misstatement of the prosecutor previously referred to herein is highlighted by Judge Neaher's caution to the government on that very point. The Court, upon the motions to dismiss, observed:

"What I find here is that these people really either left things to other people in their organization to do, or they had no direct contact with salesmen at all, because they had already lined up their business with Pappadio, and there was no need to see salesmen."

MR. SCOTTI: [Assistant United States Attorney] But nobody in the business ---

THE COURT: You can't say nobody "
(Tr. 1042) (Emphasis supplied.)

Despite this admonition, Mr. Scotti persisted in misquoting the record for the jury.

The law is clear that such a misstatement mandates a new trial.

"When a prosecutor misstates facts in his closing remarks or states facts outside of the record in such a way as to prejudice a defendant, a new trial is required."
United States v. Newman, 490 F.2d 139
(3rd Cir. 1974).

The law in this Circuit is well settled that:

"...the jury's consideration in a case should be limited to those matters actually brought out in evidence and that summation should not be used to put before the jury facts not actually presented in evidence. This doctrine is especially important in criminal trials: the prosecutor represents 'a sovereignty whose obligation is to govern impartially.' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314. As Berger suggests, this obligation may cause a jury to place more confidence in the word of a United States Attorney than in that of an ordinary member of the Bar." United States v. Spanglet, 258 F.2d 338, 342 (2nd Cir. 1958); see also: Bugros v. United States, 304 F.2d 177, 178 (2nd Cir. 1962); United States v. Holt, 108 F.2d 365, 370 (7th Cir. 1939); United States v. Sober, 281 F.2d 244, 250 (3rd Cir. 1960).

In the instant case, we are not merely faced with a simple misstatement of facts. The fact misstated was crucial to the entire theory of the government's case. If the government could prove that "no one" knew De Lorenzo, its burden would have been that much less. Furthermore, the total disregard in the Court's prior admonition cannot go unanswered. He chose to ignore that warning. This Court should not permit such disobedience to go unanswered.

Although the above was the most egregious misstatement of fact in the prosecutor's summation, further errors only served to compound the prejudice. Through sleight of hand, the government had changed its theory of prosecution in mid-stream, and attempted to demonstrate that Pappadio had retained the monies allegedly paid to De Lorenzo. The government called Mario Suriano, Pappadio's nephew to testify that the appellant had loaned him Twenty-Five Thousand (\$25,000) Dollars in cash and checks. Among the checks were a total

of Nine Hundred (\$900) Dollars, payable to De Lorenzo (but not endorsed by him).

Not satisfied with this testimony the prosecutor sought to embellish it by clearly inferring that the entire Twenty-Five Thousand (\$25,000) Dollars had come from the De Lorenzo checks.

"He [Pappadio] treated these checks as his very own money to do with what he saw fit, including giving a loan of Twenty-Five Thousand (\$25,000) dollars to his nephew by marriage to build a house. That's what Michael Pappadio thought of these checks." (109-110A).

It is one thing to argue that Pappadio appropriated Nine Hundred (\$900) Dollars in De Lorenzo checks for his own use and quite another to say that Twenty-Five Thousand (\$25,000) Dollars, nearly a year's salary for De Lorenzo from MBH or Bidio, was so employed.

The prejudice did not end here - nor did the mis-statements. Based upon this "proof" of a minimal number of De Lorenzo checks being used by Pappadio, Mr. Scotti asserted that DeLorenzo never received the proceeds of these checks (Tr. 1204, 1228).

The prosecution, hoping to drive the final nail into the appellant's coffin, then elected to argue that not only was Pappadio guilty of the crimes charged in the instant indictment, but that he was guilty of additional criminal activity.

"Mr. Pappadio wasn't indicted for personal income tax evasion. We should have, but we didn't." (126A)

The clear implication of this statement was that somehow the

government was being lenient toward Pappadio by only indicting him for some of the "crimes" he allegedly had committed although no grand jury had even passed upon this issue. Such a remark in rebuttal summation was highly prejudicial and merely served as an accumulation of the prior prejudice.

Similar remarks by a prosecutor have been soundly condemned. In reversing a criminal conviction, the Supreme Court observed that:

"The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."
Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

As clearly seen herein, the prejudice of Mr. Scotti's remarks was inherent particularly in view of the weakness of the government's case. Such improper statements constitute reversible error if prejudice accrued to the appellant or,

"...if the case was otherwise so weak that an assumption of no prejudice is unwarranted."
Bryant v. United States, 484 F.2d 65 (5th Cir. 1973).

Clearly, in this close case, the intemperate remarks of the prosecutor were highly inflammatory and prejudicial, and a new trial is warranted.

POINT II

THE APPELLANT DID NOT MAKE A
MATERIAL MISREPRESENTATION ON
THE 941 FORM.

During the course of the trial, the defendant Pappadio moved to dismiss Counts 5, 6, 7, 10 and 12 (Tr . 1077-1112). These counts charged Pappadio with wilfully and knowingly making and subscribing the Employer's Quarterly Federal Tax Returns (Form 941) while not believing them to be true and correct as to every material matter. The asserted material misrepresentation is that Pappadio falsely listed Matteo De Lorenzo as a salaried employee when he was allegedly not an employee. The appellant claims that this was not a material misrepresentation. The Court below held that it was.

In order to determine whether Pappadio made and subscribed the 941 Form falsely as to a material matter we must initially determine the purpose of a 941 Form. The Internal Revenue Service requires employers to submit these information forms on a quarterly basis. Mr. Markowitz, attorney for De Lorenzo, attempted to explain the purpose of the 941 Forms at a bench conference. He stated that:

"The ultimate purpose is how much money did you deduct from Social Security, and whatever you deducted, give it to the government. That is the purpose of it, and there is no doubt about it, that they deducted the money. . . and they did give it to the government." (Tr.1085)

If a person is falsely represented as an employee and the corporation deducts his salary as a business expense, then the government can pursue the corporation for evading taxes by filing a false corporate return. The 941 Form is an information form. It informs the government whether the proper amount of money has been deducted from the salary paid to the employee. Employees are listed and money is withheld and forwarded to the government. In fact, if an employee's name is fraudulently added to the 941 Forms, the government actually gains because it receives the monies that have been deducted from this person's salary. There is no claim that the appellant failed to turn these deductions over to the government.

At a side-bar conference, Mr. Schwartz, attorney for Pappadio, stated that:

"The 941 Form, its basic and sole purpose is to list the amount of wages withheld." (Tr.1099)

Whether De Lorenzo was an employee or was not an employee is not material to that return. (It is material only to the corporate income tax return.)

The Court below disagreed with counsel for the appellant and held that falsely listing a person as an employee on a 941 Form was a material misrepresentation as to the 941 Form.

During the course of the trial, neither side was able to show the Court either an IRS regulation or a case exactly on

point, which discussed the purposes of the 941 Form. However, an examination of applicable law can clarify the issue. In discussing the purpose of the 941 Form the United States Court of Appelas, First Circuit explained the taxing scheme of which Form 941 is a part. It stated that:

" Employers are required to withhold from their employees' wages the federal employment taxes imposed on those salaries. See Int. Rev. Code §§ 3102, 3402. The employer holds the sums collected in a trust for the Government and is required by the Commissioner of Internal Revenue to make periodic deposits of these monies in depositary banks of the federal reserve system. See Int. Rev. Cod §§ 3501, 6302; Treas. Regs. 31.3501-31.6302(c)-4. The Internal Revenue Service (IRS) 'draws on' these accounts to satisfy the employer's liability for the withheld taxes. " United States v. Romanow, 509 F 2d 26, 27. (1st Cir.1975)

The court then went on to explain the reason why the 941 Form is required. It stated that:

"The employer is required to file Form 941 quarterly. It contains, among other items, information as to the total wages paid which were subject to the withholding tax, the amount of tax actually withheld by the employer, a computation of the tax liability of the employer, and the amount of withheld tax monies actually deposited in the federal reserve bank for the quarter. The form then contains instructions for adjusting the total deposits figure to reflect any previous overpayments by the taxpayer, as well as several lines for calculating the taxpayer's current tax balance. By computing these, the employer determines whether he is to remit additional funds to the Government or is entitled to a refund or credit from excess deposits."

United States v. Romanow, supra at 27-28

This definition as applied to the instant case supports the views advanced by the appellant. The purpose of the 941 Form is to inform the government of how much money is being withheld from the employee and is being deposited in the federal reserve bank for the appropriate quarter. Falsely listing a person as an employee does not have any effect on this purpose. Nowhere in the Romanow case is the question of whether or not a person is an employee discussed or even referred to as a material fact. Thus, even assuming the truth of these charges, such action does not result in a material misrepresentation. The Lower Court erred by not dismissing Counts 5, 6, 7, 10 and 12.

Even if the Court should disagree with the above argument, the issue of whether this was a material misrepresentation was an issue of fact, not of law, and as such should have been left for the jury to decide. By finding as a matter of law, the trial court has invaded the province of the jury. This plain error provides an additional ground for reversing the conviction.

POINT III

THE TRIAL COURT ERRED BY NOT SEVERING
THE TWO SEPARATE CONSPIRACIES.

The court below erred in holding that there was proper joinder of all the defendants under Rule 8(b) of the Federal Rules of Criminal Procedure.

Joinder under 8(b) is permitted only if

(1) Defendants are alleged to have participated in the same act or transaction or if, (2) defendants are alleged to have participated in the same series of acts or transactions. Except for count 4, which was a limited substantive count related to one tax year, there was no count alleging joint participation at all.

According to Professor Charles A. Wright in his distinguished commentary on the Federal Rules,

"No matter how similar offenses may be, they may not be joined in a case in which there is more than one defendant unless they can be said to arise out of a series of acts or transactions. This principle is controlling in a situation, in which it is charged that one defendant committed a similar offense, but there is no allegation that the two offenses arose out of a series of transactions in which both defendants participated. Joinder is not permitted." 1 Wright, Federal Practice and Procedure [Federal Rules of Criminal Procedure], §144 at p. 325 (1969).

In the instant case, there was no such allegation in the indictment, nor could one be inferred from the indictment that the defendants participated in the same series of acts or transactions. A "series" of acts under 8(b) is something more than "similar" acts. King v. United States, 355 F.2d 700, 703 (1st Cir., 1966). The

common activity must constitute a substantial portion of the proof of the joined charges. United States v. Roselli, 432 F.2d 879 (8th Cir. 1970), cert. den., 401 U.S. 924. The conduct upon which each count is based must be a part of a factually related transaction in which all defendants participated. United States v. Leach, 429 F.2d 956 (8 Cir. 1970), cert. den., 402 U.S. 986.

The government cannot string together numerous conspiracies whose only connection is that one defendant has participated in all. Kotteakos v. United States 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 155 (1946). In the instant case, it would appear that the government has tried to fit this case into the category of a wheel conspiracy. This type of conspiracy has been described by Professor Wright as being,

"...one in which a person or persons at the hub conspire separately with various persons on particular transactions ... in a 'wheel' conspiracy it is said that there must be proof that those at the spokes knew of the existence of the other spokes, and thus knowingly participated in a single overall conspiracy." 1 Wright, Federal Practice and Procedure [Federal Rules of Criminal Procedure], § 144 at p. 332 (1969).

In apparent recognition of the continued vitality of Kotteakos v. United States, supra, the government charged no overall conspiracy linking all the defendants. In Kotteakos v. United States, supra, the Court found these to be improper joinder of the defendants. The Court determined that:

"The pattern was that of separate spokes meeting at a common center, though we may add without the rim of the wheel to enclose the spokes." 328 U.S. at 754-755, 66 S.Ct. at 1243.

Under the government's theory, Pappadio is the "hub" and the remaining defendants the "spokes". The indictment failed to charge and the government failed to prove the existence of a "rim" of the wheel to enclose the spokes. The counts in the indictment are unrelated by any common count linking them together in a series.

Courts have found that improper joinder (under Rule 8) is inherently prejudicial, United States v. Bora, 493 F.2d 33 (5th Cir., 1974). They have further held that:

"Misjoinder under Rule 8 is a matter of law, completely reviewable on appeal."
United States v. Marionneaux, 514 F.2d 1244, 1248 (5th Cir. 1975).

A joint trial, in a situation where there should have been severance, cannot be regarded as harmless error. McElroy v. United States, 164 U.S. 76, 81, 17 S.Ct. 31, 35, 41 L.ed. 355 (1896); McTheany v. United States 365 F.2d 90, 95 (CA 9, 1966).

As noted above, there is no single conspiracy naming all defendants. It has been noted in this Circuit:

"Absent the conspiracy count, we doubt that the joinder requirements of Fed.R. Crim. p. 8(b) could be met, since not all the appellants were otherwise 'alleged to have participated in the same act or transactions constituting an offense or offenses' (emphasis supplied)."
United States v. Miley, 513 F.2d 1191, 1209 2 Cir. 1975) United States v. Granello, 365 F.2d 990, 993-94 (2 Cir. 1966), cert denied, 386 U.S. 1019, 87 S.Ct. 1367, 18 L.Ed. 2d 458 (1967), reh, denied, 387 U.S. 949, 87 S.Ct. 2072, 18 L.Ed. 2d 1340 (1967).

As patent objective proof that there was no support for the claim that defendants participated in the same series of acts,

there was no common conspiracy count and all of the counts against which this issue is addressed fail to name all defendants as joint parties. If the government contended the defendants were part of an overall general scheme, what is the explanation for no common conspiracy count to defraud the government? The simple fact is that the government recognized it was dealing with separate conspiracies and chose to properly break them apart rather than risk running afoul of the warnings expressed by the Second Circuit in such cases as United States v. Miley, supra, as to multiple conspiracies. But the government misses the point of such cases if upon separating the conspiracies, it nonetheless thinks that danger can be avoided by the device adopted in this indictment.

The Court of Appeals has warned against a trial of separate conspiracies in one court because of obvious prejudice that would result if a party to a separate conspiracy was forced to sit through a trial in which evidence would be received relating to a separate conspiracy. Would not the same danger of prejudicial spillover have occurred in the instant case because the evidence admitted to each separate conspiracy might have been collectively considered by the jury in arriving at a verdict. The evidence, if isolated and considered separately as to each conspiracy count, might not have been sufficient by itself to convince the jurors to reach a guilty verdict on either conspiracy count. By allowing the government to simultaneously introduce evidence on both conspiracy charges, the jury might have developed an unwarranted reaction that the appellant was guilty, resulting in a guilty

verdict in a circumstance where they otherwise would have found the appellant innocent if they only heard evidence as to one conspiracy or the other.

The government may argue that joinder was proper for reasons of efficiency and convenience, but these should not be used as controlling factors. Professor Wright in his treatise on the Federal Rules, discussed this point and stated that:

"Efficiency in administration of criminal trials is an important value. Rule 2 says that the rules are intended to provide for the 'just determination' of criminal cases and that they should be construed to secure 'fairness in administration'. Justice and fairness should control over the demands of efficiency." 1 Wright, Federal Practice and Procedure, supra at § 141, p. 305.

Any balancing should be weighed heavily in favor of the defendants:

"It seems strange indeed that one presumably innocent may be made to undergo something less than a fair trial, or that he may be prejudiced in his defense if the prejudice is not 'substantial', merely to serve the convenience of the prosecution." Id., at 306.

Even if severance was not required under Rule 8, the court should have granted severance in the exercise of its discretion under Rule 14. This rule allows a court to grant severance if it appears that prejudice will result from a joint trial.

Severance under Rule 14 is discretionary with the court. In the instant case the appellant, Pappadio, submits that the trial court clearly abused its discretion. If this Court finds that

a defendant may have been prejudiced by the refusal to grant severance, then the conviction must be reversed. United States v. Bozza, 365 F.2d 206 (2nd Cir. 1966). It has also been held that if one defendant makes a sufficient showing of prejudice, the other defendants tried with him must also be given a new trial. Anderson v. United States 318 U.S. 350, 356-357, 63 S.Ct. 599, 602, 87 L.Ed. 829 (1943); Cross v. United States, 335 F.2d 987, 991, 118 U.S. App. D.C. 324 (D.C., 1964); United States v. Tomaiolo, 249 F.2d 683, 696 (2nd Cir., 1957).

The instant case consisted of two separate conspiracies. The defendant, Pappadio, was greatly prejudiced by the decision to allow joinder. Some of the witnesses testified at the same time, as to Pappadio's involvement in each conspiracy. It is very likely that some confusion occurred as to the conspiracy against whom the proof was received. The jury might have cumulated the evidence of the various crimes and conspiracies charged. (Clearly, a limiting instruction is not always sufficient to prevent the jurors from confusing and cumulating the evidence).

There was danger of a spillover effect as evidence of a conspiracy between Pappadio and Esposito (over the course of a lengthy trial) might have been considered by the jurors in determining whether Pappadio and De Lorenzo were guilty of a separate conspiracy. The prosecutor felt that damaging evidence was presented in court against Esposito and Pappadio to show that a conspiracy existed between them. On page 996 of the trial transcript the prosecutor stated that Helen Miller testified that

Pappadio ordered her to put Esposito's name on the books, that she never gave any paychecks to Esposito even though he visited the premises and that she cashed Esposito's checks and gave the cash to Pappadio.

On page 1000 of the trial transcript the prosecutor describes an admission that was presented against Esposito and Pappadio. The prosecutor stated that:

"In terms of admissions, I would submit that when Mr. Esposito goes to Mr. Daro and says, Look, I need a job and says nothing else and Mr. Pappadio says to Mr. De Lorenzo [meaning Mr. Daro] he had no right to go to you, bother you, in essence, I'll take care of it, those are admissions by both Pappadio and Esposito that in fact Mr. Esposito never did any work for Daro Sales just as no work was done for Mr. Pappadio and Bidio Management."

It is possible that some of the jurors might have agreed with the prosecutor and found this evidence to have been damaging against Pappadio. This might have added to their feelings of whether or not Pappadio was guilty of a crime. Even though the charges against Esposito were dismissed, it would be difficult for the jurors to separate in their minds which evidence they should no longer consider. (Also, the jurors were not informed that the government failed to present an adequate case against Esposito, only that he was no longer present at the trial and Esposito's charges should no longer be considered, Tr 1198-1199).

The trial court abused its discretion by refusing to grant a severance in the instant case where there was a strong probability that the jury would be confused as to which conspiracy certain evidence was being admitted against and there was a great danger

that evidence against one defendant would "spillover" and be considered by the jury against another defendant.

POINT IV

AS TO COUNTS 3 AND 4, THE GOVERN-
MENT FAILED TO PROVE AN ESSENTIAL
ELEMENT OF THE CASE.

In Counts 3 and 4 of the indictment, the defendant Pappadio is charged with falsely preparing and signing corporate tax returns of MBH and Bidio. The conviction on these counts should be reversed because the government failed to prove one of the elements of the alleged crime. The government failed to present adequate proof that the acts were performed by Pappadio in New York.

During the trial the government presented some evidence that Pappadio assisted in preparing the corporate tax returns and that he signed them. The government failed to present any evidence at all that these returns were prepared or signed by Pappadio in either the Southern District of New York (where the case originated) or the Eastern District of New York (where the case was subsequently transferred).

The instant case is similar to *United States v. Bohle*, 445 F.2d 54, 58 (7th Cir., 1971), appeal after remand 475 F.2d 872 (7 Cir., 1973). In that case, the allegation of venue was not sustained by the evidence. The *Bohle* court stated that:

"In such a case the defendant has no notice of the defect of venue until the Government rests without proving what it has alleged."
United States v. Bohle, supra, at p.58

The defendant cannot be said to have waived his venue objection because,

"...until he has such notice, there can be no waiver." id.

The situation in the instant case also concerns an indictment which alleged venue. The government failed to support the allegation that the tax returns were prepared in New York. Therefore, the defendant did not waive his venue objection. Pappadio properly raised the objection during the trial, upon the completion of the government's case (Tr. 1115-1116). The convictions as to Counts 3 and 4 should be reversed because the government failed to prove an essential part of the charge.

POINT V

INSUFFICIENT EVIDENCE WAS PRESENTED DURING
THE TRIAL TO SUSTAIN A GUILTY VERDICT

There has been insufficient evidence presented during the trial to sustain a guilty verdict. The government's case was a weak one, based solely on hypothetical situations that it posed to the jury and circumstantial evidence.

Although we realize that at this stage, all reasonable inferences must be inferred in favor of the government, a jury finding cannot be upheld where the evidence is so lacking that a reasonable man would have a reasonable doubt. Hemphill v. United States, 402 F.2d 187 (D.C. Cir. 1968). The instant case should be guided by this principle. The government did not meet the heavy burden that it had to sustain.

The government attempted to prove that De Lorenzo and Esposito did not work for MBH and Bidio through various people who owned and worked in garment businesses that dealt with MBH and Bidio. These people did not know who De Lorenzo was, but could not state whether or not he actually worked for Pappidio's corporations. In many of these cases, the witnesses were not in a position within their own companies which would give them the opportunity to deal with salesmen.

The testimony of all of those witnesses (the customers) could be disregarded. Judge Neaher summed it up in his statements:

"I would say the testimony of the customers that I heard, for the most part, was ambivalent, to say the least." (Tr. 1015).

"But your proof that he never worked, as I see it, rests largely on what I consider highly inconclusive testimony of these garment people." (Tr. 1019);

"Now, the only thing that troubles me with respect to Esposito is that these garment people, I feel, were not particularly helpful. First of all, some of them virtually disclaimed any real contact with either of these two corporations because they left it to their cutting people." (Tr. 1027);

"How do we know their cutting foremen were not approached." (Tr. 1029)

When the judge dismissed the case against Esposito he discussed the worth of the evidence offered through the garment industry representatives. He stated:

"The evidence of the garment industry representatives did not establish that Esposito performed no services, merely that those representatives had no dealings with him." (Tr. 1056)

No additional evidence was produced through these witnesses which would prevent this statement from being equally applicable to De Lorenzo.

During the trial, the government seemed to change its theory of prosecution. The indictment centered on the charge that De Lorenzo and Esposito were falsely listed as employees, thus evading corporate tax (and giving false information on De Lorenzo's and Esposito's personal income tax returns). The focus of the prosecution was on the charge that Pappadio kept De Lorenzo's salary for himself, thus evading his personal income tax return. This was not a charge in the indictment, but this is actually what the government tried to prove. In fact, during the prosecutor's closing remarks to the jury before they retired to determine the verdict, he stated that:

"Mr. Pappadio wasn't indicted for personal income tax evasion. We should have but we didn't." (Tr. 1289)

There is a great possibility that the jury was not able to properly determine if the defendants were guilty of the crimes charged in the indictment. The jurors might have agreed with the prosecution and found Pappadio guilty of evading his personal income tax (a crime that he was not given notice of and was not required to defend himself against).

The thrust of the remaining circumstantial evidence presented in the case was to prove Pappadio guilty of an unindicted crime. The additional evidence which distinguished De Lorenzo from Esposito was based upon that theory. This evidence was presented in such a way as to imply that Pappadio kept all the corporate money that was supposed to go to De Lorenzo.

First, Helen Miller testified that she cashed several of De Lorenzo's checks and gave the proceeds to Pappadio. The government tried to imply that Pappadio kept this money. That was mere speculation. There was never any proof offered to show that Pappadio failed to turn this money over to De Lorenzo. (It was not the defendants' burden to prove that Pappadio did not keep the money for himself.)

Next, the government presented proof that over 100 of De Lorenzo's checks were not personally endorsed by him. We know this because Helen Miller testified that she cashed

some of De Lorenzo's checks. Again, this doesn't necessarily mean that De Lorenzo did not receive the proceeds of the checks or that Pappadio actually received the proceeds of these checks. (This also was a burden which the prosecutor was obligated to overcome.)

The final piece of evidence that the government used to show the guilt of the defendants was the fact that among the \$25,000 in cash and checks that Pappadio lent to his nephew, Suriano (so that Suriano could build a house), were seven checks totaling \$900 which were made payable to De Lorenzo and were not endorsed by him (Suriano signed his own name on the checks and deposited them in his bank account). The prosecution tried to make it seem as if the entire \$25,000 consisted of De Lorenzo checks and attempted to imply that because Pappadio gave the \$900 in checks to Suriano, he always received and kept De Lorenzo's salary. This is mere speculation on the part of the prosecution and is an absurd assumption. The \$900 is less than 1% of the amount that the government charges was wrongly paid by the corporations to De Lorenzo. There could be many different logical reasons why Pappadio had control of these checks. The burden was on the government to show that Pappadio did not have a right to possession of these checks or that he illegally kept the proceeds of these checks. Pappadio did not have the burden to show that he was rightfully in possession of these checks

(even though the government made it appear as though Pappadio did have to meet this burden).

These three items of evidence comprise the entire case against De Lorenzo (as pointed out before by Judge Neaher, the testimony of the witnesses from the garment industry could be entirely disregarded). This evidence was introduced by the government in order to imply that Pappadio kept all the money that was supposed to be paid to De Lorenzo, thus evading his personal income tax. A very weak case was presented to prove that De Lorenzo was not really an employee. It was based on the opinion and speculation of the prosecutor along with some weak circumstantial evidence.

The circumstantial evidence may suggest the possibility that De Lorenzo and Pappadio might be guilty of a crime. It would be equally logical to presume other reasons for the actions taken by De Lorenzo and Pappadio. The appellant is entitled to a presumption of innocence until guilt is proven beyond a reasonable doubt. This burden was upon the government.

Applying that principle to the instant case, the conviction below should be reversed. There was not sufficient evidence presented to convict the defendants byond a reasonable doubt. According to the United States Supreme Court,

"...and of course a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt." United States v. Vuitch, 402 U.S. 62, 72, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971).

CONCLUSION

For the aforementioned reasons, it is respectfully requested that the judgment of conviction be reversed and that the case be remanded for a new trial not inconsistent with the findings of this Court.

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Respectfully submitted,

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